

THE EQUAL RIGHTS AMENDMENT: FREQUENTLY ASKED QUESTIONS

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The proposed Equal Rights Amendment (ERA) to the United States Constitution is a political and cultural inkblot onto which many people project their greatest hopes or deepest fears about the changing status of women. Since it was first introduced in 1923, the ERA has generated both rabid support and fervid opposition. Interpretations of its intent and potential impact have been widely varying, even contradictory.

These frequently asked questions about the ERA encourage an understanding of the amendment based on facts rather than misinformation. A 17-minute educational film, “The Equal Rights Amendment: Unfinished Business for the Constitution,” can be purchased as a DVD or downloaded via www.equalrightsamendment.org.

1. Why is an Equal Rights Amendment to the U.S. Constitution necessary?

The Equal Rights Amendment is necessary because the Constitution has never been interpreted to guarantee the rights of women as a class and the rights of men as a class to be equal.

When the U.S. Constitution was adopted in 1787, the rights it affirmed were guaranteed equally only for certain white males. After a bloody civil war and ongoing political struggles, those rights have been extended far more broadly through constitutional amendments, laws, and court decisions. However, those rights are not yet guaranteed to apply equally without regard to sex.

The Equal Rights Amendment would provide a fundamental legal remedy against sex discrimination by guaranteeing that constitutional rights may not be denied or abridged on account of sex. For the first time, sex would be considered a suspect classification, as race, religion, and national origin currently are. Governmental actions that treat males or females differently as a class would be subject to strict judicial scrutiny and would have to meet the highest level of justification – a necessary relation to a compelling state interest – to be upheld as constitutional.

The ERA would guarantee “Equal Justice Under Law” (as inscribed over the entrance to the

Supreme Court) and send a strong preemptive warning against writing, administering, or adjudicating laws unfairly on the basis of sex.

2. What is the political history of the Equal Rights Amendment?

The Equal Rights Amendment was first proposed nearly a century ago and has still not been added to the U.S. Constitution.

The original Equal Rights Amendment was proposed in 1923 by Alice Paul, a leader of the woman suffrage movement, and was introduced in Congress in the same year. It stated:

Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction. Congress shall have power to enforce this article by appropriate legislation.

In 1943, Paul reworded the text into the key Section 1 of the ERA (now called the “Alice Paul Amendment”) that was eventually sent to the states for ratification in 1972:

Section 1: Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.

Section 2: The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3: This amendment shall take effect two years after the date of ratification.

This wording was modeled on the 19th Amendment (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex”), which since 1920 has been the Constitution’s only explicitly affirmed guarantee of an equal right for women, the right to vote.

On March 22, 1972, in accordance with the constitutional amendment process described in Article V of the Constitution, the ERA passed the Senate and the House of Representatives by the required two-thirds majority and was sent to the states for ratification. No time limit is mentioned in Article V, but a seven-year deadline was placed in the proposing clause, not in the text of the amendment itself. [*See Question 5 for more details.*] In 1978, when the ERA had received only 35 of the necessary 38 approvals (three-fourths of the states, as required by Article V), Congress passed a bill by a simple majority extending the deadline to June 30, 1982. Although Article V does not give the President any role in the amendment process, President Jimmy Carter signed the extension bill as a symbolic show of support for the ERA.

By the June 30, 1982 deadline, no more states had ratified the ERA. Two weeks later, the amendment was reintroduced in Congress, and a November 1983 floor vote in the House of Representatives under a suspension of the rules failed to achieve the required two-thirds majority by only six votes. The ERA has continued to be reintroduced in every session of Congress since that time.

Beginning with the 113th Congress (2013-2014), wording that varies from the 1972 version has been

added to the text of the reintroduced ERA bill in the House of Representatives:

Section 1: Women shall have equal rights in the United States and every place subject to its jurisdiction. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2: Congress and the several States shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3: This amendment shall take effect two years after the date of ratification.

Section 1 specifically names women in the Constitution for the first time, and the addition of "and the several States" in Section 2 affirms that enforcement of the constitutional prohibition of sex discrimination is a function of both federal and state levels of government.

In the 117th Congress (2021-2022), the reworded ERA bill in the House of Representatives is *H.J. Res. 28* (lead sponsors, Representatives Carolyn Maloney, D-NY, and Tom Reed, R-NY). The ERA bill in the Senate, unchanged from the 1972 version, is expected to be introduced by lead sponsor Senator Robert Menendez, D-NJ.

3. What is the three-state strategy for ERA ratification?

An unprecedented “three-state strategy” has obtained the remaining three necessary state ratifications nearly four decades after the Congressionally imposed deadline passed.

Legislation was first introduced in Congress in 1994 to implement a novel method for ERA ratification, a “three-state strategy” first proposed by the ERA Summit, a national volunteer organization of ERA advocates that met in Washington, DC during the 1990s.

This strategy was developed after the 1992 ratification of the 27th (Madison) Amendment, which had no time limit attached and was added to the Constitution more than 203 years after its 1789 passage by Congress. After the 38th state approved the amendment, Speaker of the House Tom Foley (D-WA) considered challenging the validity of the unusual ratification process, but he changed his mind when members of Congress realized how popular the amendment was. The Archivist published it with certification of its ratification, and a day later Congress passed a bill declaring the ratification valid, thereby affirming its political acceptance of the process. Congress has made such a legislative endorsement of a ratification only one other time, when it passed a joint resolution declaring that the 14th Amendment was duly ratified in 1868.

Acceptance of the Madison Amendment’s ratification period as sufficiently contemporaneous led some advocates to posit that the ERA’s existing 35 ratifications were still valid and that states could ratify the amendment even though the deadline had passed. They argued that the time limit on ERA ratification is open to change, as Congress demonstrated in extending the original deadline, and that precedent with the 14th and 15th Amendments shows that state votes to retract ratifications have never been accepted as valid.

The legal explanation for this strategy is found in “The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States” (Allison Held *et al.*, *William & Mary Journal of Women and the Law*, Spring 1997). Analysts at the Library of Congress’s Congressional

Research Service (CRS) considered this law article in their 1996, 2014, and 2017 reports on the status of ERA ratification and concluded that acceptance of the Madison Amendment does have implications for the three-state strategy. Resolution of the procedural issues, they said, is more a political question for Congress than a constitutional one for the courts.

The first three-state strategy bill, introduced in 1994 by Representative Robert Andrews (D-NJ), stated that when an additional three states ratify the ERA, the House of Representatives shall take any necessary action to verify that ratification has been achieved. In 2011, he joined Representative Tammy Baldwin (D-WI) in support of her bill to override any previous deadline and affirm the validity of the ERA's ratification when the constitutionally required 38 states have approved the amendment. This bill has been introduced in every session of Congress since that time, with Senator Benjamin Cardin (D-MD) as the lead sponsor in the Senate.

In the 117th Congress, the three-state strategy bills – *S.J. Res. 1* (lead sponsors Senators Benjamin Cardin, D-MD and Lisa Murkowski, R-AK) and *H.J. Res. 17* (lead sponsor Representative Jackie Speier, D-CA) – state:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That notwithstanding any time limit contained in House Joint Resolution 208, 92d Congress, as agreed to in the Senate on March 22, 1972, the article of amendment proposed to the States in that joint resolution shall be valid to all intents and purposes as part of the United States Constitution whenever ratified by the legislatures of three-fourths of the several States.

To advance the three-state strategy, ERA supporters have advocated since 1995 for passage of ERA ratification bills in the 15 states that did not approve the amendment by 1982 – Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia. By 2021, only one of those “unratified” states, Alabama, has never had an ERA bill introduced in its legislature based on this strategy.

A renewed countdown of state ratifications began on March 22, 2017, when Nevada became the 36th state to ratify the ERA, exactly 45 years to the day after Congress had passed it and sent it to the states for approval. On May 30, 2018, Illinois increased prospects for adding the ERA to the Constitution when it became the 37th state to ratify the amendment. Finally, on January 27, 2020, the Equal Rights Amendment reached the required goal of approval by 38 states when both houses of the Virginia legislature passed ERA ratification bills.

On February 13, 2020, the House of Representatives took the next step toward putting the ERA into the Constitution when it passed *H.J. Res. 79* to remove any deadline on the ERA's ratification. However, the companion bill in the Senate, *S.J. Res. 6*, was prevented by Republican leadership from being brought up for a vote in committee or on the floor before the end of that session.

In the current Congressional session, the House of Representatives on March 17 again passed its bill to remove the ERA's ratification deadline (*H.J. Res. 17*) and sent it to the Senate for action, on either that House bill or the Senate's companion bill, *S.J. Res. 1*. At this point the

Democratic Senate leadership does not have the required 60 votes to avoid a filibuster that would prevent the bill from being considered and passed. Future developments regarding the filibuster will have implications for getting the ERA bill out of the Senate.

4. Having achieved ratification by the required 38 states, is the Equal Rights Amendment now in the Constitution?

Political and legal challenges to the ratification process must be resolved before the Equal Rights Amendment can be published with certification of its ratification as part of the Constitution.

The Equal Rights Amendment has now met the standard in Article V that an amendment is “valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states.”

When a state approves a proposed amendment, it submits its ratifying documents to the National Archives and Records Administration (NARA), an independent agency. In accordance with law (1 U.S.C. 106b), when NARA receives notice of at least 38 state approvals, the U.S. Archivist publishes the amendment, with a certification of the ratification documents and a list of the ratifying states. The Archivist’s certification is final and conclusive, and the amendment is part of the Constitution as of the date of the 38th state approval, with no further action by Congress.

Some circumstances of the ERA’s history vary from Article V’s ratification process, and several of these issues have not arisen with other amendments. The ERA is the only proposed constitutional amendment to achieve approval by 38 states after the expiration of a ratification deadline set and extended by Congress. [See *Question 5.*] Also, five of the states that ratified the ERA subsequently voted to withdraw their ratification. [See *Question 6.*] As a result, several challenges to the validity of the ERA’s ratification process remain to be resolved.

In a January 6, 2020 written opinion responding to a request for clarification from the U.S. Archivist, the Department of Justice’s Office of Legal Counsel under Attorney General William Barr contended that the ERA was dead because its time limit had expired. ERA supporters in Congress and elsewhere countered that Article V gives no role in the constitutional amendment process to the Executive Branch, and that the Department of Justice’s opinion is not binding on the Legislative Branch. With new leadership at the Department of Justice under the administration of President Joe Biden, that position may be reevaluated and revised.

After Virginia’s ratification of the ERA on January 27, 2020, two lawsuits were filed against U.S. Archivist David Ferriero arguing that he has a ministerial duty (defined as the action of a public officer with no room for the exercise of discretion because the action is required by law) to publish and certify the ERA as part of the Constitution. One of these lawsuits (*Virginia, et al. v. Ferriero*) was filed by the Attorneys General of Virginia, Illinois, and Nevada, the three states that ratified the ERA after the June 30, 1982 deadline. The other lawsuit (*Equal Means Equal, et al. v. Ferriero*) was filed by a pro-ERA organization, Equal Means Equal, along with several other litigants.

A third lawsuit, filed by three states opposed to the ERA (Alabama, Louisiana, and South Dakota), argued that the Archivist should not certify the ERA because the ratification process is invalid. That litigation was dropped when the plaintiffs filed a motion to dismiss and a separate motion to intervene in the lawsuit of Virginia, Illinois, and Nevada.

On March 5, 2021, U.S. District Judge Rudolph Contreras dismissed the *VA, et al. v. Ferriero* lawsuit, saying that the states' "laudable" motives were insufficient, because the deadline set by Congress for the ratification period is valid. He said the Archivist's failure to publish and certify the amendment, which are "formalities with no legal effect," does not by legal definition cause harm, so the states have no standing to sue. On May 3, the plaintiffs filed an appeal of that ruling with the U.S. Court of Appeals for the District of Columbia, seeking a decision that the Equal Rights Amendment is now a part of the Constitution.

Many ERA opponents, including the litigants in the 2020 anti-ratification lawsuit, continue to refer to a 1981 *Idaho v. Freeman* district court ruling to support their contention that deadline extensions are invalid and rescissions are permissible. It is important to note that this decision was vacated as moot by the Supreme Court in 1982 and has no legal standing as a precedent.

While these issues are being resolved, legislatures in the remaining 12 unratified states continue to have the ability to approve the amendment, and ERA ratification bills are being introduced in the current session in a number of them.

5. Is a state's ratification of a proposed constitutional amendment valid even if a ratification deadline has passed?

Arguments both for and against the validity of the ERA's ratification process because of the time limit issue are being made in Congress, the courts, and the Executive Branch.

Article V's description of the ratification process does not mention time limits, and no amendments proposed during the Constitution's first 130 years had time limits attached. The first amendment with a Congressionally imposed ratification deadline was the 18th Amendment (Prohibition), which was sent to the states in 1917 with an arbitrarily chosen time limit of seven years. The 19th (Woman Suffrage) Amendment was passed by Congress with no deadline, but all subsequent proposed amendments that were eventually ratified contained a seven-year time limit either in the text of the amendment or (beginning with the 23rd Amendment in 1960 and including the ERA) in the proposing clause, not in the text ratified by the states.

The Supreme Court in *Dillon v. Gloss* (1921) discussed Congress's right to set a ratification deadline in a passage that is commonly considered by legal scholars to be "dictum" (a non-binding statement in a decision that does not establish precedent). The Court later said in *Coleman v. Miller* (1939) that "Congress in proposing an amendment may fix a reasonable time for ratification" (likewise widely considered to be dictum) and that the timeliness of an amendment's ratification period is a political question for Congress to resolve if and when the amendment is approved by three-fourths of the states.

Two issues related to time limits that have arisen for the first time with the ERA's ratification process are (1) the validity of extending or removing an existing deadline by a vote in Congress, either before or after the deadline has passed, and (2) the validity of a state ratification of an amendment after the deadline has passed. Some legal scholars also raise the question of whether, if the Supreme Court's language about time limits in *Dillon* and *Coleman* is in fact dictum rather than precedent, Congress's application of any time limit on a constitutional amendment's ratification period might in fact violate Article V.

In a 2019 memorandum ("The Equal Rights Amendment: Advocacy, Litigation, and the 38th State"), the Legal Task Force of the national ERA Coalition stated:

Congress has already changed the ERA's deadline once, extending it by more than three years. In doing so, Congress relied in part on the deadline's location in the preamble, rather than in the body of the amendment. No legal barrier prevents Congress from eliminating the deadline altogether – and doing so retroactively. No Supreme Court case has ever cast doubt on Congress's power with respect to the timing of ratification or suggested that Congress lacks the power to extend or remove a ratification deadline after the fact.

6. Can a state rescind or otherwise withdraw its ratification of a constitutional amendment that is still in the process of being ratified?

Article V grants no power of rescission to the states, and based on both precedent and statutory language, a state withdrawal of its ratification of a constitutional amendment has never been accepted as valid.

Five states – Idaho, Kentucky, Nebraska, Tennessee, and South Dakota – attempted to rescind or withdraw their approval of the Equal Rights Amendment before the 1982 deadline. No state vote to withdraw approval of a constitutional amendment has ever been recognized as valid.

During the 14th Amendment's ratification process, New Jersey and Ohio legislators voted yes and then rescinded their ratification, but both states were included in the published list of ratifying states in 1868. New York retracted its ratification of the 15th Amendment before the last necessary state voted yes in 1870, but it was listed as a ratifying state. Tennessee, the final state needed to ratify the 19th Amendment, approved it by one vote on August 18, 1920, but the House then "non-concurred" on August 31. However, the amendment had already been certified as part of the Constitution as of August 26 (which is now celebrated as Women's Equality Day).

In *The Story of the Constitution* (1937), the United States Constitution Sesquicentennial Commission explained that "an amendment was in effect on the day when the legislature of the last necessary State ratified. ... The rule that ratification once made may not be withdrawn has been applied in all cases; though a legislature that has rejected may later approve, and this change has been made in the consideration of several amendments."

U. S. Archivist David Ferriero wrote on October 25, 2012 to Representative Carolyn Maloney,

lead sponsor of the ERA in the House of Representatives, in response to her query about the official list of ratified states and the validity of rescissions:

NARA's website page "The Constitutional Amendment Process" . . . states that a proposed Amendment becomes part of the Constitution as soon as it is ratified by three-fourths of the states, indicating that Congressional action is not needed to certify that the Amendment has been added to the Constitution. It also states that [the U.S. Archivist's] certification of the legal sufficiency of ratification documents is final and conclusive, and that a later rescission of a state's ratification is not accepted as valid.

The Archivist's accompanying list of 35 states that had ratified the ERA by 2012 included the five states that had attempted to withdraw their approval, marked by asterisks and also listed separately in a column marked "Purported Rescission." The Archivist has recorded the ratifications of Nevada (2017) and Illinois (2018), but he has not acted to certify and publish the ERA pursuant to receiving Virginia's ratification documents in 2020.

7. Do some states have state ERAs or other guarantees of equal rights on the basis of sex?

State constitutions in half of the 50 states contain a guarantee of equal rights on the basis of sex, providing extensive evidence based on decades of state-level equal rights jurisprudence about the prospective impact of a federal ERA.

Only a federal Equal Rights Amendment can provide the highest and broadest level of legal protection against sex discrimination. However, the constitutions of 25 states – Alaska, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Washington, and Wyoming – provide either inclusive or partial guarantees of equal rights on the basis of sex. Ironically, three states with state-level equal rights amendments or guarantees – Florida, Louisiana, and Utah – have not yet ratified the federal ERA.

As a point of historical comparison, by the time the 19th Amendment guaranteeing women's right to vote was added to the Constitution in 1920, only one-quarter of the states had enacted state-level guarantees of that right.

The ways in which state equal rights guarantees are worded, cited in lawsuits, or interpreted by state courts to achieve equal rights on the basis of sex are varied. Utah and Wyoming entered the Union in the 1890s with constitutions that affirm equal rights for male and female citizens. Some states (e.g., Colorado, Hawaii) amended their constitutions in the 1970s with language virtually identical to the federal ERA. Others (e.g., New Jersey, Florida) have language in their state constitution that implicitly or explicitly includes both males and females in their state affirmations of rights. Some state equal rights guarantees are restricted: e.g., California specifies equal employment and education rights, Louisiana prohibits "arbitrary and unreasonable" sex discrimination, and Rhode Island excludes application to abortion rights.

Efforts to add equal rights amendments to state constitutions continue, with Nevada and

Minnesota working toward that goal through a public referendum on a legislative action to amend their state constitution.

8. Since the 14th Amendment guarantees all citizens equal protection of the laws, and prohibitions against sex discrimination exist in the Equal Pay Act, the Pregnancy Discrimination Act, Titles VII and IX of the 1964 Civil Rights Act, and other laws and court decisions, why do we also need the ERA?

The 14th Amendment has never been interpreted to make sex a suspect classification like race, religion, and national origin. Other laws can be repealed, ineffectively applied, or unfairly adjudicated based on social or political bias.

The 14th Amendment was ratified in 1868, after the Civil War, to deal with race discrimination. In referring to the electorate, it added the word "male" to the Constitution for the first time. Even with the 14th Amendment in the Constitution, women had to continue their political battle for the right to vote, finally guaranteed by the 19th Amendment in 1920 but even then not fully enforced on the basis of race/ethnicity.

Over a century after it was ratified, the 14th Amendment was first interpreted by the Supreme Court to prohibit sex discrimination. In *Reed v. Reed* (1971) and subsequent decisions (e.g., *Craig v. Boren*, 1976; *United States v. Commonwealth of Virginia*, 1996), the Court declined to elevate sex discrimination claims to the strict scrutiny standard of review that 14th Amendment jurisprudence requires for the suspect classifications of race, religion, and national origin. Disparate treatment of such protected classes must bear a necessary relation to a compelling state interest to be upheld as constitutional.

In cases of sex discrimination, courts currently apply a heightened (so-called "skeptical") level of intermediate scrutiny and require extremely persuasive evidence to uphold a government action that differentiates on the basis of sex. However, the intermediate standard of review requires only that such classifications must substantially advance an important governmental objective. The ERA would make sex a suspect classification protected by the highest level of judicial scrutiny.

Without the ERA in the Constitution, the statutes and case law that have produced major advances in women's rights since the middle of the last century are vulnerable to being ignored, weakened, or even reversed. Congress can amend or repeal anti-discrimination laws by a simple majority, the Executive Branch can negligently enforce such laws, and courts, including the Supreme Court, can interpret the intermediate standard of review to permit certain forms of sex discrimination.

Ratification of the ERA would also improve the United States' credibility globally with respect to sex discrimination. The majority of the world's countries affirm legal equality of the sexes in their governing documents, however imperfectly implemented. Some of those constitutions – in Japan and Afghanistan, for example – were written under the direction of the United States government.

In an interview reported in the January 2011 *California Lawyer*, the late Supreme Court Justice

Antonin Scalia disregarded 40 years of 14th Amendment precedent when he stated that the Constitution does not protect against sex discrimination. This remark has been widely cited as clear evidence of the need for an Equal Rights Amendment, in order to guarantee that all judges, regardless of their judicial or political philosophy, will have to interpret the Constitution to prohibit sex discrimination.

9. How has the ERA been related to reproductive rights?

The repeated claim of opponents that the ERA would require government to allow “abortion on demand” is a misrepresentation of existing federal and state laws and court decisions.

In federal courts, including the Supreme Court, a number of restrictive laws dealing with contraception and abortion have been invalidated since the mid-20th century based on the constitutional principles of right of privacy and due process, not equal rights. *Roe v. Wade* (1973) falls within a line of court decisions expanding the constitutional "right to privacy" to protect individuals against excessive governmental reach into certain personal decisions in their lives.

State equal rights amendments have been cited in several state court decisions (e.g., in Connecticut and New Mexico) dealing with a very specific issue – whether a state that provides funding to low- income Medicaid-eligible women for childbirth expenses should also be required to fund medically necessary abortions for women in that program. The courts ruled that the state must fund both of those pregnancy-related procedures if it funds either one, in order to prevent the government from using fiscal pressure to influence a woman’s exercise of her right to make medical decisions about her pregnancy. The New Jersey Supreme Court issued a similar decision based on the right of privacy and equal protection, not on the state constitution’s equal rights guarantee.

The presence or absence of a state ERA or equal protection guarantee does not necessarily correlate with a state’s legal climate for reproductive rights. For example, despite Pennsylvania’s state ERA, the state Supreme Court decided that restrictions on Medicaid funding of abortions were constitutional. The U.S. Supreme Court in separate litigation (*Planned Parenthood v. Casey*, 1992) upheld Pennsylvania’s restrictions on abortion under the federal due process clause.

State court decisions on reproductive rights are not conclusive evidence of how federal courts would decide such cases. For example, while some state courts have required Medicaid funding of medically necessary abortions, the U.S. Supreme Court has upheld the constitutionality of the federal “Hyde Amendment,” which has for decades prohibited the federal government from funding most or all Medicaid abortions, including many that are medically necessary.

Recent Supreme Court decisions on reproductive rights (e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 2014) have raised concerns about the vulnerability of women’s choices regarding contraception as well as abortion. The existence of an Equal Rights Amendment in the Constitution would almost certainly influence such deliberations in the future.

10. How has the ERA been related to discrimination based on sexuality?

The application of laws prohibiting sex discrimination to situations of discrimination based on sexuality is currently evolving even without an Equal Rights Amendment.

Discrimination on the basis of sexuality has not traditionally been treated by courts as a form of sex-based discrimination protected by an equal rights guarantee. Instead, federal and state laws and court decisions have rapidly evolved over the past several decades to legalize same-sex marriage and advance LGBTQAI (lesbian, gay, bisexual, transgender, queer, asexual, and intersexual) rights based primarily on equal protection and individual liberty principles.

In *U.S. v. Windsor* (2013), the Supreme Court declared unconstitutional a 1996 federal Defense of Marriage Act (DOMA), which prohibited the federal government from recognizing same-sex marriages and denied federal benefits to spouses in such marriages. The 5-4 majority ruled that DOMA violated the Constitution's equal liberty and equal protection guarantees.

In June 2015, by a 5-4 decision in *Obergefell v. Hodges*, the Supreme Court conclusively recognized a constitutional right to same-sex marriage and required the states to permit same-sex couples to exercise that right. The decision rested primarily on the Constitution's due-process and equal protection clauses, not on equal rights principles.

In June 2020, the Supreme Court ruled in *Bostock v. Clayton County* that Title VII of the Civil Rights Act of 1964, which bars employment discrimination based on race, religion, national origin, and sex, also applies to sexual orientation and gender identity. The cases under consideration dealt with the firing of an employee based on that person's sexual orientation, gender identity, or transgender status. The ruling was 6 to 3, with Chief Justice John Roberts and Justice Neil Gorsuch joining the liberal minority (Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan).

11. How has the ERA been related to single-sex institutions?

Even without an ERA in the Constitution, Supreme Court decisions have for decades increasingly limited the constitutionality of public single-sex institutions.

In 1982, the Court found in *Mississippi University for Women v. Hogan* that Mississippi's policy of refusing to admit males to its all-female School of Nursing was unconstitutional, in that case prohibiting discrimination against men as a class.

In the Court's 1996 *United States v. Commonwealth of Virginia* decision, which prohibited the use of public funds for then all-male Virginia Military Institute unless it admitted women, the majority opinion written by Justice Ruth Bader Ginsburg stated that sex-based classifications may be used to compensate the disadvantaged class for economic disabilities they have suffered, to promote equal employment opportunity, and to advance full development of the talent and capacities of all citizens. Such classifications may not be used, however, to create or perpetuate the legal, social, and economic inferiority of the traditionally disadvantaged class, in this case women.

Thus single-sex institutions whose aim is to perpetuate the historic dominance of one sex over the

other are already unconstitutional, while single-sex institutions that work to overcome past discrimination are constitutional now and, if the courts choose, could remain so under an ERA.

12. How has the ERA been related to women in the military?

Women's status in the U.S. military has advanced rapidly in recent decades even without an Equal Rights Amendment in the Constitution, but the ERA would guarantee them the "equal justice under law" that they are risking and even sacrificing their lives to defend.

In 2019, women in the U.S. military made up 20% of the Air Force, 19% of the Navy, 15% of the Army, and almost 9% of the Marine Corps. Women have participated in every war our country has fought, and they have held top-level positions in all branches of the military, as well as in government administration of defense and national security activities. They are fighting and dying in combat, and the armed services could not operate effectively without their participation.

However, without an ERA women's equal access to military career ladders and their protection against sex discrimination in their chosen profession are not guaranteed. Sexual harassment and sexual assault by fellow service members continue to be a threat for women on military duty and at the service academies.

The issue of women and the draft is often raised as an argument against the ERA. In fact, the lack of an ERA in the Constitution does not protect women against involuntary military service. Congress already has the power to draft women as well as men, and the Senate debated the possibility of drafting nurses in preparation for a possible invasion of Japan in World War II.

Traditionally and at present, only males are required to register with the Selective Service System. Because the registration requirement classifies people based on the sex assigned at birth, transgender women are required to register, while transgender men are not.

After removing troops from Vietnam in 1973, the United States shifted to an all-volunteer military and has not since that time drafted registered men into active service. In *Rostker v. Goldberg* (1981), the Supreme Court upheld the constitutionality of a male-only draft registration. In recent years, however, Department of Defense planning memos and Congressional bills dealing with the draft or national service have included both men and women.

The Department of Defense's 2015 decision to open all combat positions to women has revived the public debate about whether a future draft would include women. It is virtually certain that a reactivated male-only draft system would be legally challenged as a form of sex discrimination and would most likely be found unconstitutional, with or without an ERA in the Constitution. Draftees would continue to be examined for mental, physical, and moral fitness and other grounds for exemption (e.g., student status, parental status) before being inducted into military service.

Since there is no imminent prospect of reinstituting the draft and no way to know what its requirements would be, a discussion about the ERA's relation to it is primarily theoretical.

13. Would the ERA adversely affect existing benefits and protections that women now receive

(e.g., alimony, child custody, Social Security payments, etc.)?

Laws that include language based on sex stereotypes can be brought into conformity with the Equal Rights Amendment by substituting sex-neutral categories (e.g., "primary family caregiver" instead of "mother") to achieve their objectives.

Most family law is written, administered, and adjudicated at the state level. Court decisions in states with ERAs show that the benefits opponents claim women would lose remain constitutional if they are provided in a sex-neutral manner based on function rather than on stereotyped sex roles. That same principle would apply to laws and benefits related to Social Security and other programs at the federal level.

Courts have for many years been moving toward sex-neutral standards in family court decisions, and legislatures have been writing laws with increased attention to sex-neutral language and intent. Legislators will have two years after the ERA is ratified to revise sex-based classifications in laws that might be vulnerable to challenge as unconstitutional after that time.

14. Does the ERA shift power from the states to the federal government?

The ERA would not transfer jurisdiction of any laws from the states to the federal government.

Opponents have called Section 2 of the ERA ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article") a "federal power grab." In fact, that clause, which sometimes lists enforcement by the states as well, appears in eight other amendments, beginning with the 13th Amendment in 1865. The ERA would simply be one legal principle among others in the Constitution by which courts evaluate the constitutionality of governmental actions.

15. What level of public support exists for a constitutional guarantee of equal rights for women and men?

People in the United States overwhelmingly support a constitutional guarantee of equal rights on the basis of sex.

Despite heightened partisanship and increased visibility of anti-equality policies and messaging in recent years, a 2020 poll by the Associated Press-NORC Center for Public Affairs Research found that the Equal Rights Amendment continues to have significant majority support nationally. To the question "Do you favor or oppose the Equal Rights Amendment?" 73% of respondents (89% of Democrats, 61% of Republicans) said they favor it. Only 4% of respondents (1% of Democrats, 9% of Republicans) indicated that they oppose it. The fact that 22% of respondents replied "Neither" (10% of Democrats, 30% of Republicans) may indicate in part a lack of knowledge of what the ERA is rather than an unwillingness to express support of it. Questions in previous polls generally made clear that it was a constitutional guarantee of equal rights for women and men. In line with previous polls, the gender gap was not significant, with 76% of women and 70% of men supporting the ERA.

Recent past polls have also shown that the ERA has public support at an almost unprecedented

level. According to a 2016 poll commissioned by the national ERA Coalition, the research agency db5 found that 94% of Americans support an amendment to the Constitution to guarantee equal rights for men and women. This support reached as high as 99% among 18-to-24-year-olds and African-Americans, Asian-Americans, and Hispanic-Americans. However, 80% of those polled thought the Constitution already guarantees equal rights to males and females.

In April 2012, a Public Policy Polling survey for Daily Kos/Service Employees International Union (SEIU) asked, “Do you think the Constitution should guarantee equal rights for men and women, or not?” The responses were 91% yes, 4% no, and 5% not sure.